No. 83-539

IN THE

Supreme Court of the United States

October Term, 1983

ARTHUR ANDERSEN & CO.,
COOPERS & LYBRAND,
ALEXANDER GRANT & COMPANY,
SOCIETE COMMERCIALE DE REASSURANCE and
SCOR REINSURANCE COMPANY,
Petitioners,

v.

JAMES W. SCHACHT, the Acting Director
of Insurance of the State of Illinois and
Liquidator of Reserve Insurance Company,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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Pursuant to Supreme Court Rule 28.1, a list of parents, subsidiaries and affiliates of corporate petitioners was submitted in the petition (Pet. 2) and remains accurate. A petition for review of the same decision has been filed, *Brown et. al v. Schacht*, No. 83-548.

TABLE OF AUTHORITIES

In an effort to shield the opinion of the court of appeals from review, respondent asserts as proven fact matters that at best are merely allegations,[1] distorts the holding of the court below, and misstates the points contained in the petition for certiorari. Such tactics cannot obscure the importance of this case and the questions it presents.

I. RESPONDENT IS INCORRECT IN CONTENDING THAT THE COURT OF APPEALS DID NOT DECIDE THE QUESTIONS PRESENTED.

The court of appeals held that a RICO treble damage action may be brought by " 'any person' who possesses the rudimentary connection with the operation of an enterprise through predicate offenses or who suffers injury therefrom. . . ." (Pet. App. 36a). The court of appeals itself characterized the RICO treble damage provision, as so construed, as a "runaway treble damage bonanza for the already excessively litigious" and called it a "dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime." (*Id.*).

In so holding, the court of appeals addressed the three questions presented to this Court for review in the petition. Respondent's contention to the contrary (Br. In Opp. i, 11) is refuted by the court of appeals' opinion, which

— rejected injury limitations on RICO treble damage actions that would prevent them from "federaliz[ing]

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[1] Contrary to implications in respondent's brief in opposition (pp. 3-5), nothing in the court of appeals' opinion indicates that that court or any other has found any substantiation for respondent's allegations. The court of appeals specifically declined to express any judgment on the facts or merits of the complaint (Pet. App. 10a, 37a). Although the district judge found the allegations sufficient under F.R.Civ.P. 9(b), the district judge's three-sentence disposition of the issue (Pet. App. 4c) is erroneous and inconsistent with more recent authority, *see, e.g., Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111 (2d Cir. 1982). The Rule 9(b) issue was not certified by the district court for interlocutory appeal to the Seventh Circuit nor was the district court's treatment of the Rule 9(b) issue briefed by petitioners in the Seventh Circuit or decided by that court. We shall not otherwise respond to this aspect of the brief in opposition, except to assure the Court that we will rebut the allegations, if necessary, in an appropriate forum.

the common law of 'garden variety' business fraud and eclips[ing] the federal securities laws" (Pet. App. 20a-32a) and sustained the complaint on the theory that the cause of injury was the alleged "*defrauding*" of the state insurance department (Pet. App. 31a, emphasis added);[2]

— concluded that a fraud-based RICO treble damage claim could be brought by a wholly owned subsidiary corporation that was plainly not defrauded by actions of the subsidiary's parent and sole shareholder and that was suing for the same damages claimed by other litigants (Pet. App. 5a-14a); and

— ruled that the RICO damage action could be maintained against outside accountants and reinsurers, even though the complaint pleaded no facts showing that these outside entities conducted the affairs of the enterprise. (Pet. App. 33a-35a).

The importance of the issues thus decided was recognized not only by the Seventh Circuit panel, but also by those Seventh Circuit judges who voted to rehear the case *en banc*.

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[2] Contrary to statements by respondent, petitioners are not arguing before this Court and did not argue in the court of appeals that a *violation* of 18 U.S.C. § *1962(c)* requires proof of "an economic advantage for the perpetrator." (Br. In Opp. 11). Instead, under point I of the petition, petitioners have addressed the type of *injury* for which a plaintiff may obtain a treble damage *remedy* under 18 U.S.C. § *1964(c)*. Legislative history cited in the petition (pp. 15-18)—which respondent is unable to refute—indicates that Congress intended 18 U.S.C. § 1964(c) to redress a specific form of economic disadvantage distinctively caused by a RICO violation. This issue concerns the requirements for seeking damages under 18 U.S.C. § 1964(c), not the requirements for establishing a violation of § 1962(c). The court of appeals addressed this issue (Pet. App. 27a-30a) and it is ripe for review.

II. RESPONDENT IS INCORRECT IN CONTENDING THAT THE DECISION OF THE COURT OF APPEALS IS SUPPORTED BY DECISIONS IN OTHER CIRCUITS.

While not disputing that a large number of district court decisions are contrary to the decision below,[3] respondent contends that there is support for the court of appeals' decision in four other circuits besides the Seventh (Br. In Opp. 13). The cases respondent cites, however, refute that contention.

In *Moss v. Morgan Stanley,* [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,478 at n.16 (2d Cir. 1983), the Second Circuit, in a corrected opinion, expressly stated that a "growing number of courts . . . have limited standing under 18 U.S.C. § 1964(c)" and reserved decision on the type of injury limitations on RICO treble damage actions discussed by petitioners. (Pet. 18-20).[4] A few days after *Moss,* a different Second Circuit panel indicated that there may be another limitation on RICO treble damage actions in that circuit, reserving decision on whether a private RICO action may be brought against a defendant not convicted of committing predicate acts. *Trane Company v. O'Connor Securities,* [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,502 (2d Cir. 1983).

The Sixth Circuit in *USACO Coal Co. v. Carbomin Energy, Inc.,* 689 F.2d 94 (6th Cir. 1982) did not discuss injury requirements for a RICO treble damage action at all, except to observe that the statute requires injury to "business or property by reason of a violation of § 1962," 689 F.2d at 95, as opposed to § 1961—an observation that supports petitioners. The Sixth Circuit found arguments concerning RICO in that case to be "superfluous" because the court was reviewing the grant of a

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[3] *See, e.g.,* in addition to cases cited at Pet. 18-20, *Dakis v. Chapman,* [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,498 (N.D. Cal. 1983); *Oil Resources, Inc. v. Quantum Resources Corp.,* No. C-82-1230W (D. Utah September 30, 1983); *Guerrero v. Katzen,* No. 82-2426 (D.D.C. July 29, 1983).

[4] The corrected opinion in *Moss,* issued a few days after the release of the typescript opinion, restored a portion of footnote 16 of the opinion that had been dropped in the initial printing. The full text of footnote 16 of *Moss* is reprinted at 15 BNA Sec. Reg. & L. Rep. 1877 (October 7, 1983).

preliminary injunction *not* issued because of a RICO claim, but issued only in connection with a breach of fiduciary duty claim. 689 F.2d at 96. Similarly, in *Morosani v. First National Bank of Atlanta,* 703 F.2d 1220 (11th Cir. 1983), the Eleventh Circuit reversed the dismissal of a private RICO suit on the ground that the district court had erroneously defined the predicate act of mail fraud; the court of appeals declined to reach any other question and remanded the case.

Finally, the Eighth Circuit in *Bennett v. Berg,* 685 F.2d 1053 (1982), *modified en banc,* 710 F.2d 1361 (8th Cir. 1983), *petition for cert. filed,* No. 83-587 (October 8, 1983) [5] rejected some of the injury limitations for RICO treble damage actions discussed by petitioners, but did not address others. Furthermore, the Eighth Circuit *en banc* required the district court to give special consideration to the issue of the participation of each defendant in the conduct of the affairs of the enterprise (*see* Pet. point III), in stark contrast to the decision below. While respondent contends that the decision below dealt with the participation requirement of 18 U.S.C. § 1962(c), the very text of the opinion below respondent cites addressed only the issue of whether the reinsurers were "employed by or associated with" an enterprise. (Pet. App. 33a-34a). The requirement of conducting the affairs of the enterprise is distinct from the requirement of association under § 1962(c), but the court below addressed only the latter and did not apply the former.

In short, the court of appeals in this case has gone where other courts have been unwilling to go. Indeed, the Seventh Circuit panel in this case has given short shrift to a prior Seventh Circuit decision, authored by one of the judges who dissented from the refusal to rehear this case *en banc,* which observed that Congress did not intend to create "waves of treble damages suits" in the "wake of every RICO violation." *Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449, 457 (7th Cir.), *cert. denied,* 103 S. Ct. 177 (1982).

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[5] The petition in No. 83-587, *Prudential Insurance Company of America v. Bennett,* filed approximately one week after the instant petition, seeks review of various aspects of the Eighth Circuit's *Bennett* decision.

III. THE TIME IS RIPE FOR THIS COURT TO REVIEW A RICO TREBLE DAMAGE CASE.

This is not just another RICO case; it is *the* case in which RICO treble damage actions are being offered to persons whose injuries were not contemplated by Congress when it enacted the organized crime legislation of which RICO is but one title. In acknowledging that its interpretation of 18 U.S.C. § 1964(c) allowed the provision to become a "runaway treble damage bonanza for the already excessively litigious" (Pet. 36a), the court of appeals was acknowledging that, under its interpretation of the statute, RICO will become the vehicle of choice for plaintiffs alleging "fraud" to seek treble damages, attorneys' fees and federal jurisdiction.

The Seventh Circuit panel considered this result to be compelled by this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981), even though *Turkette* was a criminal case and this Court observed there that the civil provisions of RICO were more limited and could not be used to "narrow" the criminal provisions. *Id.* at 585. Similarly, litigants such as respondent and other courts may read certain language in this Court's recent decision in *Russello v. United States*, No. 82-472, (November 1, 1983) to support the result reached by the Seventh Circuit panel, even though the "sole issue" in *Russello* concerned the definition of an "interest" subject to forfeiture at the government's initiative under 18 U.S.C. § 1963(a)(1). Slip op. at 4.

Unless this Court promptly decides the proper scope of the RICO treble damage provision, the decision of the court of appeals in this case will undoubtedly stimulate an enormous increase in RICO treble damage lawsuits in the already overburdened United States district courts. The Court observed that *Russello* was "yet another case" concerning RICO. Slip op. at 1. If the decision of the Seventh Circuit panel is allowed to stand, *Russello*—a government case—will be only the tip of the iceberg; the deluge of private RICO treble damage cases will have only begun.

CONCLUSION

The petition for certiorari should be granted. If certiorari is granted in No. 83-587, *supra* n.5, the instant petition should be granted and the cases set for argument in tandem.

Respectfully submitted,

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